In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 666

J. C. MARTIN CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30) is reported at 346 F. 2d 147. The order and opinion of the Federal Trade Commission (J.A. 57a–63a)[1] are not yet reported. An earlier case involving the same parties is reported at 242 F. 2d 530 (C.A. 7) (J.A. 259a–268a).

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1965, and a petition for rehearing was denied on July 15, 1965. The petition for a writ of certiorari was filed on October 13, 1965. The juris-

[1] "J.A." refers to the Joint Appendix filed in the court below.

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diction of this Court is invoked under 28 U.S.C. 1254 (1) and 15 U.S.C. 45(c).

QUESTIONS PRESENTED

1. Whether a 1957 court of appeals order setting aside a cease and desist order of the Federal Trade Commission is *res judicata* with respect to a Commission proceeding commenced in 1962 against the same party involving similar trade practices but covering a different period of time, involving different evidence and raising different issues of law.

2. Whether the decision in the 1957 case deprived the Commission of jurisdiction to conduct the 1962 proceeding without first obtaining the court of appeals' permission.

STATEMENT

In a proceeding initiated on July 13, 1962, the Federal Trade Commission found that petitioner and its sole stockholder, Jack Kaslow, had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by selling merchandise through (1) a lottery scheme and (2) a gaming device, and ordered them to cease and desist. Petitioner's sales method involved mailing illustrated brochures (Comm'n Ex. 1–5) to members of the general public to induce them, in return for cash or merchandise premiums, to solicit orders for the articles depicted therein. An integral part of the material in the brochures was a set of "pull-tabs" under each of which was a symbol representing a different item of merchandise and the price charged therefor. The solicitors were expected to

offer prospective purchasers the opportunity to pull a tab and thus obtain the right to buy the item shown underneath it at the price indicated. In most cases, the prospective purchaser did not know which item he was buying or its price until he had pulled and detached the concealing tab. Petitioner's mark-up varied considerably among the several items offered for sale in each brochure (J.A. 39a–40a, 42a–45a).

In 1957, the United States Court of Appeals for the Seventh Circuit vacated and set aside a cease and desist order against petitioner, Kaslow and one Orenstein relating to a similar sales plan. *J. C. Martin Corp.* v. *Federal Trade Commission,* 242 F. 2d 530. The Commission had held in that case that petitioner's scheme constituted a "lottery", even though there was no evidence as to the relative dollar value of the merchandise sold (J.A. 253a–254a). Agreeing that the elements of consideration and chance were present in petitioner's plan, the court of appeals reversed on the ground that petitioner's scheme could not properly have been found to be a "lottery" without a showing that a prize was involved and that this showing could not be made without evidence of the relative dollar value of the merchandise sold through the "pull-tab" mechanism. Relying on this previous decision, petitioner argued before the Commission and the court below that the Commission lacked jurisdiction to proceed on the present complaint without obtaining permission of the Seventh Circuit and that the decision in the 1957 case was *res judicata* in the instant proceeding.

The Commission rejected the defense of *res judicata* on the ground that the present case presented "new and different issues of fact and law" (J.A. 62a). It noted that the time covered by the practices alleged here was different from that involved in the earlier case and that the theory of the complaint and order in the present case was broader than that in the prior case—the present case applying the "gaming device" standard approved by the Seventh Circuit in *Gerson* v. *Federal Trade Commission*, 325 F. 2d 93 (J.A. 62a). The Commission further held that it followed from its ruling that the doctrine of *res judicata* did not apply that this complaint did not constitute the "reopening" of the previous case and that the Seventh Circuit did not have jurisdiction over the 1962 proceeding (J.A. 62a).

The Court of Appeals for the Third Circuit (Kalodner, Hastie and Freedman, J.J.) affirmed *per curiam*, holding that the Commission's findings and order were supported by the record and that the defense of *res judicata* or collateral estoppel had no merit (Pet. 30).

ARGUMENT

1. The primary question raised here was decided against petitioner by this Court in *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, which held that the vacating and setting aside of a Commission order for failure of proof does not bar a subsequent proceeding with regard to similar trade practices occurring during a later period of time.

The Commission had proceeded against Raladam in 1929, charging deceptive practices in the sale of its weight-reducing product. The Commission's cease and desist order was vacated on review on the ground that there was no evidence of injury to competition. (*Raladam Co.* v. *Federal Trade Commission*, 42 F. 2d 430 (C.A. 6)), and this Court affirmed (*Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643). In 1935, the Commission instituted a second proceeding charging essentially the same deceptive practices. The record covered Raladam's practices subsequent to the prior order and contained evidence of injury to competition. This Court found Raladam's assertion that the second action was barred by *res judicata* "without merit" (316 U.S. at 152). In so holding, the Court stated: "It is clear that the reasons for refusing to enforce the Commission's [earlier] order are grounded upon the inadequacy of the findings and proof, as revealed in the particular record then before this Court. Hence, these reasons are not controlling in this case, arising, as it does, out of different proceedings and presenting different facts and a different record for our consideration" (316 U.S. at 150–151).

The *Raladam* decision is controlling here. The first order against petitioner, issued on June 29, 1956, was vacated because of the absence of evidence as to the relative dollar values of petitioner's merchandise (see J.A. 267a). The record in the second proceeding, which concerned trade practices occurring from May 1957 to 1960 (J.A. 62a; see J.A. 89a–90a), con-

tained evidence and explicit findings as to the relative value of the various items petitioner offered for sale (J.A. 42a–45a).

Furthermore, the present case was tried under a legal principle which was not applied in the earlier proceedings; *i.e.*, that a device calculated to appeal to the public's gambling instincts may violate Section 5 even if it is not technically a lottery (J.A. 62a).[2] This principle was applied by the Seventh Circuit in *Gerson* v. *Federal Trade Commission*, 325 F. 2d 93, which held unlawful a sales method identical to petitioner's.[3] The failure of proof on the Commission's "lottery" theory in the proceeding culminating in 1957 may not be relied on permanently to insulate petitioner from the operation of Section 5—particularly when a new legal theory has been held to render the same practices unlawful when carried on by other, possibly competing, organizations. It is well settled that *res judicata* does not apply to prevent an admin-

[2] Although the earlier complaint charged petitioner with using "a game of chance, gift enterprise or lottery scheme" (J.A. 246a), the Commission's decision was based solely on finding the three essential elements of a common law lottery: consideration, chance and prize (J.A. 253a). The reviewing court was limited to the grounds relied upon by the Commission (*Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196), and based its decision only on the lottery theory.

[3] Indeed, as the court of appeals pointed out, "Gerson, although a resident of Brooklyn, New York, established his place of business in Chicago to take advantage of this court's decision in J. C. Martin" (325 F. 2d at 94, n. 2).

istrative agency from requiring all persons under its jurisdiction to abide uniformly by the same general standards of conduct. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 599–602; *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 235–236; Davis, *Administrative Law Treatise*, § 18.04, citing *Raladam* with approval.[4]

2. There is nothing in the opinion and order vacating and setting aside the Commission's order in the first *Martin* case to suggest that the Court of Appeals for the Seventh Circuit intended to retain a continuing and exclusive jurisdiction so as to prevent the Commission, without leave of the court, from bringing a new proceeding against petitioner raising different issues and covering a different period of time (J.A. 259a–268a). Indeed, petitioner's decision to appeal to the Third Circuit, instead of the Seventh Circuit, whose jurisdiction is claimed to be exclusive, might amount to a waiver of any such claim.[5]

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[4] Petitioner's assertion that the present proceeding constitutes "harrassment" by the Commission has no merit. The present complaint was filed more than eight-and-a-half years after the one filed in the earlier proceeding and more than five years after the decision of the Seventh Circuit in that case (J.A. 13a, 247a, 259a).

[5] The suggestion that the decision below is in conflict with that of the Seventh Circuit in the 1957 *Martin* case (Pet. 29) is insubstantial. Indeed, the Commission in this case explicitly followed the Seventh Circuit's decision in *Gerson*, *supra*, decided after the *Martin* case (J.A. 62a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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